

I5N3GAL1

1 UNITED STATES OF AMERICA  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 UNITED STATES OF AMERICA,

4 v.

16 Cr. 371 (RA)

5 JOHN GALANIS, et al.,

6 Defendants.

7 -----x

8 New York, N.Y.  
9 May 23, 2018  
9:00 a.m.

10 Before:

11 HON. RONNIE ABRAMS,

12 District Judge

13  
14 APPEARANCES

15 ROBERT KHUZAMI  
16 Acting United States Attorney for the  
17 Southern District of New York  
18 BY: BRENDAN F. QUIGLEY  
REBECCA G. MERMELSTEIN  
NEGAR TEKEEI  
Assistant United States Attorneys

19 PELUSO & TOUGER  
20 Attorneys for Defendant John Galanis  
BY: DAVID TOUGER

21 BOIES, SCHILLER & FLEXNER LLP (NYC)  
22 Attorneys for Defendant Devon Archer  
BY: MATTHEW LANE SCHWARTZ  
23 LAURA HARRIS  
24  
25

I5N3GAL1

Appearances (Cont'd)

PAULA J. NOTARI

Attorney for Defendant Bevan Cooney

- and -

O'NEILL and HASSEN

Attorneys for Defendant Bevan Cooney

BY: ABRAHAM JABIR ABEGAZ-HASSEN

Also present: Kendall Jackson, Paralegal

Ellie Sheinwald, Paralegal

Eric Wissman, Paralegal

Special Agent Shannon Bienick, FBI

I5N3GAL1

(In open court; jury not present)

THE COURT: Before the prospective jurors arrive, there are two issues we need to address. First is to the disclosure issue.

I'm not going to require the defense to disclose the exhibits it intends to introduce in its case in chief on cross of government witnesses in advance. I know that the defense in *Silver* engaged in reciprocal discovery of this sort, but not only was that a retrial, but I've since learned that the defense consented to that procedure, which is obviously not the case here. I have not been able to speak with Judge Gardephe about the other case the government referenced.

I'll also say, though, that I don't think it is appropriate for me to order the government to do it. I think it's best practice to do it. I hope that you'll still advise the defendants of which exhibits you intend to use with the witnesses in advance, because I think it will significantly speed up the trial. But I'm not going to order you to do it.

So that's my ruling. In short, I'm not going to order either side to do it. But, I hope that the government at the very least will do so.

So next, as for the evidence relating to Michael Milken, my view on this issue has evolved in light of the parties' most recent submissions about how this evidence would come in, and frankly the questioning of prospective jurors

I5N3GAL1

1 yesterday.

2           So I'm going to grant Mr. Archer's motion in limine.  
3 It would be a different story in my view if the government  
4 could call a witness who was a party to one of the e-mails to  
5 testify about what he understood or she understood the  
6 reference to mean or who could otherwise testify that he or she  
7 had communications with one of the defendants in which Milken  
8 was referenced, and therefore could better speak to the  
9 defendant's state of mind. But I'm not going to permit just  
10 any witness to testify generally about Milken's reputation.

11           The government suggested that I could take judicial  
12 notice of his conviction, but to present the jury with a fair  
13 and balanced view of his admittedly complicated past, would  
14 also require me to take notice of his success in the high-yield  
15 junk bond industry, to which I know the government consents, as  
16 well as his philanthropy and efforts with reference to the  
17 Milken Institute which is referenced in one of the text  
18 messages comprising Government Exhibit 3004.

19           To fully explain Government Exhibit 2217, moreover, I  
20 would also likely need to take notice of Leon Black's  
21 reputation and his relationship with Mr. Milken, while they  
22 both worked at Drexel in the 1980s, and I don't think that  
23 would be appropriate. And I'm frankly not even going to  
24 dignify the government's suggestion that Judge Wood be called  
25 to testify as a witness.

I5N3GAL1

1           In addition, upon further consideration of the e-mails  
2 at issue, I find it increasingly likely that the references to  
3 Mr. Milken were not a reference to his criminal conviction,  
4 particularly, because as I understand it, his criminal activity  
5 did not relate to high-yield junk bonds, but instead involved  
6 efforts to, among other things, violate the rules on capital  
7 that governed his stock trading firm, file inaccurate financial  
8 statements with government regulators, and to inflate the price  
9 of a stock. Particularly because these e-mails clearly relate  
10 to WLCC bonds, it seems more likely that Mr. Cooney was in fact  
11 referring to Mr. Milken's career in the bond industry, a  
12 finding bolstered by the similar reference to Leon Black, a  
13 manager of the Apollo private equity firm who, as far as I  
14 know, has never been alleged to have engaged in criminal  
15 activity.

16           While the government is of course correct that it is  
17 generally for the jury to decide between competing inferences,  
18 here there appears to be no viable way for the jury to have all  
19 the information it would need to adequately make that  
20 determination.

21           This is, however, a fair topic for cross-examination  
22 in the event that either Mr. Archer or Mr. Cooney were to  
23 testify.

24           MR. QUIGLEY: Your Honor, just so we understand your  
25 Honor's ruling. So on 2217 then, is it correct that we're

I5N3GAL1

1 still allowed to offer the exhibit, we just have to redact --

2 THE COURT: No, I think you should redact the  
3 reference to Milken.

4 MR. QUIGLEY: Understood. But the rest of the  
5 e-mail --

6 THE COURT: Just the reference to Milken.

7 MR. QUIGLEY: Understood.

8 THE COURT: Just to complete the ruling for the  
9 record, in light of the absence of sufficient evidence that it  
10 is probative of Mr. Cooney's intent, I find that the references  
11 contained in the e-mails do run afoul of 403. I'm concerned  
12 that jurors, some of whom were questioned yesterday, are more  
13 likely to be aware of his high-profile guilty plea than his  
14 innovation of high-yield junk bonds. That there is a  
15 substantial risk of unfair prejudice and/or confusion. At the  
16 very least, both risks substantially outweigh any probative  
17 value these references may possess.

18 So, in terms of the exhibits, my understanding, based  
19 on Mr. Archer's motion, is that you are only, you only made a  
20 motion to redact Exhibits 2217, 2204, and 3004; is that right,  
21 those three?

22 MR. SCHWARTZ: Your Honor, I don't have the papers in  
23 front of me. I think that we explicitly set out in our motion  
24 papers the exhibits, but I'll certainly talk to the government.

25 THE COURT: Look at that. The question, I had thought

I5N3GAL1

1 you did not object to a particular exhibit, which was 3226. I  
2 understand you don't have it in front of you, but go back and  
3 look so we're all on the same page on that in advance. I'll  
4 note if we do send a copy of the indictment back then we'll  
5 need to redact paragraph 11C.

6 MR. SCHWARTZ: Thank you. Just one technical thing I  
7 raised with the government but I haven't heard a response.  
8 Thus far where they've been redacting things, they've been  
9 blacking them out. We've asked them to white them out so as  
10 not to call attention to the redactions. If that's technically  
11 hard for them, we're happy to assist.

12 But the whole point of the redactions is to excise  
13 that from the jury and we think the big black box just calls  
14 attention to the fact that the jury is not able to see  
15 something.

16 THE COURT: Can you do that, can you do the whitening  
17 out?

18 MR. QUIGLEY: Our concern is that makes the e-mail  
19 look like the formatting is weird.

20 THE COURT: Try your best. And if it is a technical  
21 issue and it is something that Boies can do and you all can't  
22 do, why don't you work together on that. But, I don't see why  
23 that should be an issue.

24 MR. QUIGLEY: Okay, your Honor.

25 MR. SCHWARTZ: Thank you, your Honor.

I5N3GAL1

1 THE COURT: Any other issues? My inclination is to  
2 bring the jury in, even just to start with whomever is here and  
3 go out of order. We don't yet have a new pool of prospective  
4 jurors, so what I was inclined to do is ask the individual  
5 questions of all the people that remain from yesterday who were  
6 not tainted, do them ideally in the order of their number, but  
7 to the extent people aren't here yet, go a little out of order  
8 and have that group take a break while we read the whole  
9 questionnaire with the new prospective jurors. All right?

10 MS. MERMELSTEIN: One issue, your Honor, to revisit  
11 from yesterday.

12 Mr. Touger indicated at the end of yesterday that in  
13 the event the government suggested in its opening that the  
14 Wakpamni Lake Community or the Wakpamni Lake Community  
15 Corporation were victims of this crime, that he intended to  
16 object. And to the extent it was not sufficiently clear that  
17 there is a difference between the Wakpamni Lake Community  
18 Corporation and the Wakpamni Lake Community, he intended to  
19 object and was going to move for a mistrial. That's fine. I  
20 mean, the government --

21 THE COURT: He shouldn't do that in front of the jury.

22 MS. MERMELSTEIN: Yes. So we ask your Honor preserve  
23 for the record any objection, but it not be made at the  
24 opening.

25 THE COURT: We'll do that at sidebar. Your objection



I5N3GAL1

1 is preserved and you can make it again at sidebar, but I don't  
2 want to interrupt the government's --

3 MR. TOUGER: Just so the record is clear, my argument  
4 is not about the WLCC. It is about Wakpamni Lake Community.  
5 Not the corporation. It is about the community. Those are two  
6 separate entities and that's what the government seems to  
7 conflating them into one and they're not. One is a corporation  
8 and one is people.

9 THE COURT: All right. Understood. I also,  
10 Mr. Touger, wanted to remind you that my law clerk has a set of  
11 government exhibits and that Mr. Galanis is free to consult  
12 them at any point, if you want.

13 MR. TOUGER: Are those them?

14 THE COURT: Yes. Just feel free to use them and show  
15 them to him if you don't have an extra copy. So no one's here  
16 yet?

17 THE DEPUTY CLERK: No, we have some. Just not all.

18 THE COURT: I think unless anyone has any issues, I  
19 think we should just start with whomever we have.

20 (Jury selection continues under separate cover)

21 (Continued on next page)

I5n6gal2

1 (Open court; jury present)

2 THE COURT: To the jury, welcome.

3 To all of you, thank you so much for your time and  
4 attention. I know this is a difficult process as I said  
5 before, but it is a very important one. I am truly grateful  
6 for your willingness to serve on this jury.

7 Ms. Cavale is going to escort you out with the Court's  
8 thanks.

9 (Jury venire excused)

10 THE COURT: First of all, thank you. We have spent a  
11 lot of time together, but I am grateful that you are doing your  
12 duty as citizens. So thank you.

13 We're going to swear you in as jurors when Ms. Cavale  
14 comes back. For a few minutes now I am going to give you some  
15 general instructions and tell you a little bit how the process  
16 is going to work and then I will let you go home for the day.

17 It will be your duty to find from the evidence what  
18 the facts are. That is your duty as jurors. You and you alone  
19 are the judges of the facts from the evidence presented at  
20 trial. You will decide what happened here and you will then  
21 have to apply those facts to the law as I will give it to you  
22 at the end of the case. You must follow the law as I explain  
23 it whether you agree with it or not.

24 As I said earlier nothing I say or do during the trial  
25 is intended to indicate what the verdict should be nor is it

I5n6gal2

1 evidence in any way. So please don't speculate as to what I  
2 may be thinking.

3 The evidence from which you will find the facts will  
4 consist of the testimony of the witnesses who will sit in the  
5 witness box and documents and other things that are received  
6 into the record as exhibits. The lawyers may also agree or  
7 what we say stipulate to certain facts. When they do that,  
8 when they stipulate to certain facts, you are to accept those  
9 facts as true although it will be for you to decide the weight,  
10 if any, to be given to those facts.

11 Certain things are not evidence and must not be  
12 considered by you as evidence. I am going list them for you.  
13 First, statements, arguments and questions of the lawyers are  
14 not evidence nor are the statements as I said that I make or  
15 ask of a witness. It is the answers to those questions that  
16 are evidence. Objections to questions are not evidence.  
17 Lawyers have an obligation to their client to make an objection  
18 when they believe that evidence is improper under our Federal  
19 Rules of Evidence. So you should not be influenced by an  
20 objection or my ruling on it.

21 If the objection is sustained, the witness will not be  
22 permitted to answer the question and you must ignore the  
23 question. If the objection is overruled, the witness will be  
24 permitted to answer the question and you should treat the  
25 answer like any other. If you're instructed that an item of

I5n6gal2

1 evidence is being received for a limited purpose only, you must  
2 follow that instruction. If I strike an answer or instruct you  
3 to disregard an answer, then that testimony is not evidence and  
4 cannot be considered by you.

5 Also if you see or hear anything outside this  
6 courtroom, it is not evidence and must be disregarded. Your  
7 verdict must be based solely on the evidence or lack of  
8 evidence presented in this courtroom at trial.

9 One of your most important tasks is going to be to  
10 evaluate the credibility of the witnesses who will testify here  
11 at trial. It will be up to you to decide which witnesses to  
12 believe, which witnesses not to believe, and how much of any  
13 witness's testimony to accept or to reject. I will give you  
14 some guidelines for determining the credibility of witnesses at  
15 the end of the case. In the meantime, please listen carefully  
16 to the witnesses as they testify for you will be called upon to  
17 evaluate their credibility at the end of trial.

18 It is important to remember that this is a criminal  
19 case. In such cases, the government bears the burden to prove  
20 each essential element of the crimes charged beyond a  
21 reasonable doubt. The burden never shifts to the defendants  
22 for the simple reason that the law presumes every defendant to  
23 be innocent and never imposes upon a defendant in a criminal  
24 case the burden or duty of the calling any witness or producing  
25 any evidence. In other words, as to each charge against each

I5n6gal2

1 defendant, the defendant starts with a clean slate and is  
2 presumed innocent until such time, if ever, that you as a juror  
3 are satisfied that the government has proven that particular  
4 defendant's guilt on that charge beyond a reasonable doubt.

5 Now, the question that obviously and naturally arises  
6 is what is reasonable doubt. The words almost define  
7 themselves. It is a doubt based on reason, judgment,  
8 experience and common sense. It is a doubt that a reasonable  
9 person has after carefully weighing all of the evidence. Proof  
10 beyond a reasonable doubt must therefore be proof of such a  
11 convincing character that a reasonable person would not  
12 hesitate to rely and act upon it in the most important of his  
13 or her affairs. Beyond a reasonable doubt does not mean beyond  
14 all possible doubt. It is practically impossible for a person  
15 to be absolutely and completely convinced of any disputed fact  
16 that by its nature cannot be proved with mathematical  
17 certainty. In the criminal law, guilt must be established  
18 beyond a reasonable doubt but not all possible doubt.

19 If after a fair and impartial consideration of all of  
20 the evidence you do have an abiding belief of a defendant's  
21 guilt and believe that you will be willing to act upon without  
22 hesitation in important matters in the personal affairs of your  
23 own life, then it is your sworn duty to convict that particular  
24 defendant on that count in the indictment. If, however, you do  
25 not have an abiding conviction of the defendant's guilt, if you

I5n6gal2

1 have such a doubt as would cause you to hesitate before acting  
2 in matters of importance to yourselves, then you have a  
3 reasonable doubt and in that circumstance, it is your sworn  
4 duty to return a verdict of not guilty on that count as to that  
5 defendant.

6 Now a few words about your conduct as jurors. As I  
7 noted previously during the trial, you're not to discuss the  
8 substance of the case with anyone and nor are to you permit  
9 anyone to discuss it with you. Until you retire to the jury  
10 room at the end of the case to deliberate, you're simply not to  
11 talk about the case. Don't even discuss the case with each  
12 other until you begin your actual deliberations. That is very  
13 important. If you see the lawyers in a case or the witnesses  
14 or court staff, don't speak to them. They are not going to  
15 speak to you. They are not being impolite. They are simply  
16 following my instructions and are not permitted to talk to you.

17 If anyone should try to talk to you about this case,  
18 please bring it to my attention by telling Ms. Cavale, but  
19 don't tell anyone else. Don't tell the other jurors. Don't  
20 read about or talk about the facts or circumstances of this  
21 case whether in person or online or on social media. Don't  
22 Tweet or make comments about any of the substance of the case  
23 or anything you learn about the trial until after the trial is  
24 over and deliberations are over and then it will be up to you  
25 if you want to talk about it or if you don't.

I5n6gal2

1           You are instructed not to read, listen to, watch media  
2 reports, television, newspapers, radio, Internet about the case  
3 or similar cases or any of the individuals involved. Again,  
4 the reason for that is that you cannot be influenced by  
5 anything you might see or hear outside the courtroom. If you  
6 inadvertently come across a news report relating to this case  
7 or a similar case, again just stop reading, stop listening,  
8 stop watching and tell Ms. Cavale and again no one else  
9 including your fellow jurors.

10           I think I already said this but, don't do any research  
11 or investigation into the case or anything touching on it or  
12 any of the names or places that I mentioned.

13           If you do recognize someone in the courtroom during  
14 the course of the trial, please let Ms. Cavale know. If it  
15 occurs while the trial is in session, raise your hand.

16           Finally, keep an open mind throughout the trial and  
17 reserve judgment until after all of the evidence is in. Until  
18 you have heard all of the evidence and the closing arguments  
19 and my instructions on the law, you really are not in a  
20 position to reach any conclusions. Therefore, do keep an open  
21 mind until you retire to deliberate and have really completed  
22 those deliberations.

23           I do let jurors take notes during the course of a  
24 trial. Ms. Cavale is going to give each of you a notepad and  
25 pen for tomorrow. Please write your name on the cover. You

I5n6gal2

1 don't have to take notes. If you do take notes, please only do  
2 so in these pads. Don't remove the notepads from the courtroom  
3 or the jury room. Just leave them in the jury room or on your  
4 seat or give them to Ms. Cavale.

5 The notes are only for your use and they are only as  
6 an aid to your memory. Your memory will ultimately control.  
7 Also, if you do take notes, just be careful that you are  
8 getting so involved with taking notes that you are not watching  
9 the witnesses and listening to the testimony. Once you are in  
10 your deliberations if there is a disagreement between one  
11 juror's notes and another juror's notes or one juror's notes  
12 and another's jurors recollection you can ask to the court  
13 reporter to read back the testimony or we can send back the  
14 testimony. It is the official court transcript that controls  
15 and not any particular juror's notes.

16 During the course of trial, exhibits will be received  
17 into evidence and they will be marked by exhibit number. If  
18 there is an exhibit you are particularly interested in seeing,  
19 feel free to write down that exhibit number and ask to see it  
20 again later. I will tell you at the end of the trial, I will  
21 give you a list of all the witnesses and all of the exhibits so  
22 don't feel like you have to feel pressured to keep track.

23 I said we normally begin trial at 10:00 a.m. I was  
24 going to ask you to come in a little early tomorrow at 9:15. I  
25 usually have jurors come in 9:30. I have breakfast for you



I5n6gal2

1 waiting as an enticement and we start at 10:00. I was going to  
2 ask you to come at 9:15 and start at 9:30. If that is a  
3 problem for anybody, tell Ms. Cavale. I will expect you to be  
4 here at 9:15 and we'll start with opening statements at 9:30.

5 I generally continue until 5:00 p.m. each day. There  
6 are a couple days where I will tell you in advance we'll start  
7 late or leave early. We normally take an hour or approximately  
8 an hour for lunch and we take a short break in the morning and  
9 a short break in the afternoon and then we try to do as much  
10 work as we can. Just keep in mind we cannot start until all of  
11 you are here. If any of you are late, it just means everyone  
12 has to wait including the lawyers, court reporter, myself, the  
13 witnesses. I just want to make sure that you appreciate the  
14 importance of coming on time.

15 Lastly, I am going to tell you a little bit about how  
16 the trial will proceed. As I said tomorrow morning we'll have  
17 opening statements. The government's attorney will make an  
18 opening statement and then defense's attorneys will make  
19 opening statements. Again, because it is the government's  
20 burden of proof, the defendants don't have to do anything  
21 unless they choose to.

22 The opening statements are neither evidence nor  
23 argument. They are simply outlines of what the attorneys  
24 believe the evidence will show and they are given to help you  
25 follow the evidence as it is presented. After the opening

I5n6gal2

1 statements, the government will present its case. The  
2 government will call its witnesses and after each witness  
3 testifies on direct examination, counsel for the defendants  
4 will have the opportunity if they want to to cross-examine  
5 those witnesses and at times there is a little bit of what we  
6 call redirect and recross.

7           Following the government's case, it will rest. The  
8 defendants may then if and only if they choose to present  
9 defense cases and counsel for the government will have the  
10 opportunity to cross-examine those witnesses if there are any.  
11 As I said, it is important to remember in a criminal case a  
12 person who is charged with a crime has no burden to prove that  
13 he is not guilty. If any of the defendants choose not to  
14 present any proof, that decision cannot be held against them in  
15 any way.

16           I will instruct you again on the burden after all the  
17 evidence is in. After the presentation of evidence is  
18 completed and both sides have rested, then the attorneys will  
19 deliver what is called closing arguments, and they will  
20 summarize and interpret the evidence for you. Just like with  
21 the opening statements, these are not evidence. These are  
22 instead arguments. Following closing arguments, I will  
23 instruct you on the law. You will then finally retire to  
24 deliberate on your verdict, which must be unanimous and must be  
25 based on the evidence presented in this courtroom.

I5n6gal2

1           You have a tremendously important task as jurors. It  
2 is to determine the facts. You and you alone and not the Court  
3 and not anyone else, you are the sole judges of the facts. The  
4 Constitution itself recognizes your unique role in our criminal  
5 justice system. So please just pay careful attention to the  
6 witness and the evidence received and follow my instructions on  
7 the law.

8           With that we're going to swear you in as jurors and we  
9 are going to say good night.

10           THE DEPUTY CLERK: Jurors please rise and raise your  
11 right hand.

12           (A jury of 12 and 4 alternates was impanelled and  
13 sworn)

14           THE COURT: Ms. Cavale is going to walk you out. She  
15 is going to give you passes to help you get in in the morning.  
16 Again, unless I hear from anyone, I expect you will be here at  
17 9:15 and we'll start promptly at 9:30.

18           Thank you again. Have a nice evening.

19           (Jury excused)

20           (Continued on next page)

I5n6gal2

(In open court; jury not present)

THE COURT: So why don't we all plan to be here at 9:15, too, and we'll have openings at 9:30. I will rule on a number of pending motions and I will rule on them as we go along during the breaks and alike.

MR. SCHWARTZ: Was someone keeping track? Did any of the seated jurors have scheduling problems on later days?

THE COURT: I am going to look at my notes tonight. I will go over it with you. I am happy to look right now. I will look tonight. Why don't you look tonight and if there is anything, we'll build it in. I am trying to remember who had doctor appointments that were on Mondays. That is a kind of thing we'll have to tell them in advance. I will have to look back in my notes unless anyone's memory is better than mine.

MS. TEKEEI: We provided to defense counsel with a list of the exhibit that we intend to be introduced through Mr. Anderson, who will be our first witness. It would be tremendously helpful if we received defense counsel's objections so we can streamline the discussion about those tomorrow.

THE COURT: If you can do that that will be helpful. Again, what I really don't want to do is keep the jury waiting while looking at an exhibit for the first time and figuring out and listening to your objections on it. Whatever you can do to prevent the jury from waiting. I will meet you after court

I5n6gal2

1 every day and talk about any issue you want to if I don't have  
2 something else scheduled. I will meet you during breaks and  
3 lunch. I don't like to keep the jury waiting. I understand  
4 defendant's concerns about not wanting to highlight all the  
5 issues you are going to raise; but if you can give me some  
6 advanced notice so I can formulate my opinion, that will be  
7 helpful.

8 MR. TOUGER: My question is why as far as the Burnham  
9 manuals, why we had to put in three different copies?

10 MS. TEKEEI: We are happy to discuss the documents  
11 individually. I just wanted to flag for the Court we had  
12 provided them and we'll engage in discourse with them this  
13 evening.

14 MS. MERMELSTEIN: Your Honor, one other issue. There  
15 have been what I assume are a number of family members who are  
16 friends of the defendants in the courtroom. That's obviously  
17 fine. There are also such people on the witness list that have  
18 been provided to the government. The government doesn't have  
19 to decide who they want to call; but if there is a possibility  
20 someone is going to be a witness, then they shouldn't be in the  
21 courtroom during the trial.

22 THE COURT: Are any of those witnesses going to  
23 testify about any of the facts that anyone else is going to  
24 testify about, or you just don't know?

25 MS. MERMELSTEIN: I don't know.

I5n6gal2

1 MR. SCHWARTZ: So the answer is I guess it depends  
2 what you mean by any of the facts. For example, I expect that  
3 Mr. Archer's wife will testify and will testify to where he was  
4 physically at various times during the relevant time period.  
5 To state the obvious I think it would be a significant problem  
6 if the government asked to bar the defendant's wife from these  
7 proceedings.

8 THE COURT: That's what I am trying to get at. I  
9 understand the concern about potentially tainting a witness's  
10 testimony by hearing the testimony of others; but if it is  
11 really not a genuine issue because the testimony will be about  
12 facts that are unrelated for the most part, I think it would be  
13 a nice thing to have his family here or let them have their  
14 families.

15 MS. MERMELSTEIN: Your Honor, of course we don't know  
16 what any of these witnesses are going to say. We haven't --  
17 not for any -- it is not a nefarious issue, but we haven't  
18 received any notice of what any defense witness is going to  
19 say. There hasn't been any 26.2 disclosure. The question for  
20 us is is it the nature of. If it is going to be character  
21 testimony, then that's fine. It is not affected by the trial  
22 testimony. What Mr. Schwartz has said is less clear to me  
23 generically that Mr. Archer is very busy or that he was in a  
24 particular place at a key moment in time that is going to be  
25 talked about and we're not in a good place to evaluate that so

I5n6gal2

1 we want to raise the issue with the Court.

2 THE COURT: Both sides are entitled to have witnesses  
3 sequestered from the courtroom if they're going to testify. I  
4 will suggest that you tell the government as much as you can to  
5 assure them that this isn't going to taint those witnesses in  
6 any way so they can stay.

7 MR. SCHWARTZ: We're happy to have that conversation.  
8 I think it is somewhere in between the poles of what Ms.  
9 Mermelstein is talking about. It is not just that he was busy  
10 but not an alibi, for lack of a better word. We can take it  
11 off line.

12 We can also take off line the issue of exhibit  
13 disclosures and certainly I am happy to give the government  
14 lists of whatever I may object to. I think we all share an  
15 interest in evidence that is unobjected to coming in quickly  
16 and the stuff that is subject to objection getting thoughtful  
17 rulings from your Honor.

18 Having thought a little bit about what the Court said  
19 this morning, and we'll talk about this, but I think I am  
20 prepared to say -- I haven't spoken to my colleague who tried  
21 to that digital case -- that if we can reach a similar  
22 agreement, which is in the government produces its -- not  
23 produces -- identifies his exhibits several days in advance and  
24 we identify our exhibits a day in advance with the  
25 understanding that they will not work those exhibits into their

I5n6gal2

1 direct, I will be happy to do.

2 THE COURT: If they were not otherwise going to. If  
3 they don't change their direct examination based on that  
4 disclosure. That is a fair request.

5 MS. MERMELSTEIN: Let us discuss that, your Honor.

6 THE COURT: Discuss that. That would be very helpful  
7 for me because when we meet at the end the day or 9:30 in the  
8 morning or earlier if there will be a lot of issues, we can  
9 decide things as quickly as possible and move the trial along.

10 MR. SCHWARTZ: The other things in terms of things on  
11 your Honor's plate, I think there is agreement except for one  
12 sort of silly thing about the stipulation with respect to the  
13 Jason Galanis, Gary Hirst, Michelle Morton pleas.

14 THE COURT: Oh, is that right?

15 MR. SCHWARTZ: I am characterizing it as a silly  
16 thing, but I care about it. They want to call it a government  
17 exhibit. It is a defense exhibit. We are impeaching their  
18 witnesses. This is exactly the presumption.

19 THE COURT: Can we make it a joint exhibit? Can we  
20 give it both the government and defense letters, numbers?

21 MR. SCHWARTZ: I don't want them putting it in on  
22 their case. When the government puts in a stip, no matter what  
23 instruction you give saying three people have been convicted in  
24 this case before, it means something very different to the jury  
25 than when we put that in this our case.



I5n6gal2

1 MS. MERMELSTEIN: Your Honor, I don't think it is an  
2 issue of the government. The 806 fights that we have had have  
3 all been about the notion that out of fairness to the defense,  
4 they have to be permitted to do that which they would have done  
5 had these witnesses actually testified. And there is no  
6 question that if these witnesses took the stand in the  
7 government's case, the government would be entitled to elicit  
8 on direct examination these facts as it will do with its for  
9 example this cooperating witness.

10 So the notion that the defense should be able to offer  
11 it only in their case and suggest the government has somehow  
12 hidden that from the jury when the government would have  
13 elicited from its witnesses were they here is not in the spirit  
14 of attempting to treat the impeachment material as though the  
15 witness was on the stand. I think therefore the government has  
16 to be able to offer it in its case-in-chief. We have no  
17 objection to it being a joint exhibit in an effort so the  
18 defense doesn't feel it is just a government exhibit, but we  
19 will not stipulate to something that is simply a defense  
20 exhibit and permit them to suggest to the jury incorrectly that  
21 the government has hidden something from the jury.

22 THE COURT: I have to tell you I think making it a  
23 joint exhibit, having it have a -- are you numbers or you are  
24 letters? Is that what we're doing?

25 MS. MERMELSTEIN: Different numbers.

I5n6gal2

1 THE COURT: You are both numbers?

2 MR. SCHWARTZ: We're both numbers.

3 THE COURT: In any event just having a Government  
4 Exhibit --

5 MS. MERMELSTEIN: That's fine.

6 THE COURT: -- 100 or whatever and Defense Exhibit  
7 such-and-such, and that way you are both sending the message to  
8 the jury that you think that this is something that helps you.  
9 That is my suggestion, but I cannot tell you what to stipulate  
10 to and I am not going to.

11 MR. SCHWARTZ: That is fine by me as long as I can  
12 read it.

13 MS. MERMELSTEIN: That's exactly the point, your  
14 Honor. The government is putting on the case. This is the  
15 impeachment of the government's purported witnesses because  
16 they are none testifying declarants. If they were on the  
17 stand, the government would elicit on direct examination and  
18 the defendant would ask what they were going to ask. The  
19 government has to be permitted to put this in when it is  
20 putting in the evidence in the case of chief.

21 The alternative is to suggest that the government  
22 didn't want to tell the jury this and the defense wanted to and  
23 that is incorrect. It does not put everyone in the position  
24 they would have been in if these witnesses did not take the  
25 stand and Mr. Schwartz has characterized it as a silly dispute,

I5n6gal2

1 but it isn't

2 THE COURT: Would it help if I said something to the  
3 jury that it is a stipulation and it comes from both sides, the  
4 government is going first and it is reading it, but it should  
5 be considered a defense exhibit just like a government exhibit?

6 MR. SCHWARTZ: I would have no problem if whenever in  
7 the government's case they wanted to do it, your Honor, your  
8 Honor's staff read the stipulation and said it was being read  
9 at the defense's request, but it was a joint stipulation.

10 THE COURT: Do you have a problem with that?

11 MR. SCHWARTZ: This is not an issue for tomorrow.

12 MS. MERMELSTEIN: The government has no objection to  
13 your Honor reading the stipulation or Ms. Cavale reading the  
14 stipulation as a way to absent it from the parties. I think  
15 what Mr. Schwartz said at the end with an instruction from the  
16 Court that the defense requested it. I think it is --

17 THE COURT: I will say you both requested it.

18 MS. MERMELSTEIN: That's fine.

19 THE COURT: We'll make it even. I am happy to read  
20 whatever you want me to read.

21 MS. MERMELSTEIN: That's not a problem.

22 THE COURT: See you all at 9:15.

23 (Adjourned to May 24, 2018 at 9:15 a.m.)  
24  
25